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No. 81-202

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Petitioners,
v.
CLAIBORNE HARDWARE COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of the respondents in this case.

This case presents questions of profound importance concerning the liability of one who organizes a group expressive activity, such as a march, a rally, or a campaign of persuasion, for the misconduct of those who join in the activity. The resolution of these questions is of profound importance to the American Federation of Labor and Congress of Industrial Organizations, a

federation of approximately 102 national and international unions with a total membership of approximately 14,500,000 working men and women. The AFL-CIO and its affiliated unions often seek to exercise their First Amendment right of free speech through collective activity, and their continued ability to do so may turn on the resolution of the issues of vicarious liability presented by this case.

It is the thesis of the accompanying brief that there is a substantial danger in transporting a set of agency rules that grow out of the world of commerce into the wholly different context of political activity. Sensitive and sometimes subtle adjustments are called for in traditional common law concepts to take account of the values stated in the First Amendment. The accompanying brief attempts the task of developing the particular adjustments that we believe are constitutionally required.

This case has been "set for oral argument in tandem with No. 81-280, *General Building Contractors Association, Inc. v. Pennsylvania* and related cases." We understand the questions of imputed liability raised in these otherwise dissimilar cases to be the thread that ties them together. It is our submission that equally sensitive and subtle adjustments are required in applying common law agency concepts to the labor-management context, where the parties are bound together not by traditional contractual relations but by a unique jural arrangement established by the National Labor Relations Act, as amended. We here develop the required adjustments in that context to sharpen and illuminate the analysis we believe appropriate in this case as well.

Because of the holiday season, and the press of preparing *amici* briefs in several cases at once,* counsel for the AFL-CIO were unable to have the attached brief

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* In the last two weeks of 1981, the AFL-CIO will have submitted briefs to the Court in No. 81-395, *Steelworkers v. Sadlowski* (joint brief with petitioner); No. 80-2150, *Finnegan v. Leu*; and No. 80-2143, *Board of Education v. Pico.*

completed, printed and filed on December 24, 1981, when petitioners' brief was submitted. (Unlike *amicus*, petitioners were not required to have their brief printed by that date but instead submitted a typewritten brief; petitioners' printed brief has not yet been filed.) This motion and the accompanying brief are being served by courier on counsel for respondents so that the motion and brief will be received at about the same time that they would have been received had they been mailed on December 24th, at the start of the Christmas holiday weekend. It is our hope and belief that the granting of this motion at this time will not prejudice respondents' ability to respond nor delay this Court's consideration of the case. Under these circumstances, and in light of the weighty interests of the AFL-CIO in participating herein, we urge that this motion be granted despite our failure, which we regret, to file until December 30th.

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Introduction and Summary of Argument	1
Argument	3
Conclusion	20

TABLE OF AUTHORITIES

Cases	Page
Alexander v. Gardner Denver, 415 U.S. 36 (1974)	18
Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981)	18
Bigelow v. Virginia, 421 U.S. 809 (1975)	4
Buckley v. Valeo, 424 U.S. 1 (1976)	6
California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980)	13, 18
Citizens Against Rent Control v. Berkeley, —— U.S. ——, 50 L.W. 4071 (1981)	5
Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925)	8-9
Dickerson v. U.S. Steel Corp., 472 F.Supp. 1304 (E.D. Pa. 1978)	16
Fruin-Colnon Corp., 227 NLRB 59 (1976)	19
Gateway Coal v. Mine Workers, 414 U.S. 368 (1974)	18
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	5, 6, 7, 8
Healy v. James, 408 U.S. 169 (1974)	10
Humphrey v. Moore, 375 U.S. 335 (1964)	18
Kermerac v. Compaigne General, 353 U.S. 625 (1959)	2
Keyishian v. Board of Regents, 385 U.S. 589 (1967)	10
Labor Board v. American Ins. Co., 343 U.S. 395 (1952)	11, 12, 13
Labor Board v. Insurance Agents, 361 U.S. 477 (1960)	13
Lummus Co. v. NLRB, 339 F.2d 728 (D.C. Cir. 1964)	19
Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973)	16
Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922)	8
Monell v. New York City Department of Social Services, 436 U.S. 658 (1978)	17
Morrison-Knudsen Co., Inc. v. NLRB, 275 F.2d 912 (2d Cir. 1960), *cert. denied*, 366 U.S. 961 (1961)	606
NAACP v. Button, 371 U.S. 415 (1963)	5

TABLE OF AUTHORITIES—Continued

	Page
New York City Transit Authority v. Beazer, 440 U.S. 571 (1979)	17
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	3, 5, 6, 8
NLRB v. Catholic Bishop, 440 U.S. 490 (1979)	12
NLRB v. Southern Stevedoring Co., 332 F.2d 1017 (5th Cir. 1964)	19
NLRB v. Trucker Drivers Local 449, 353 U.S. 87 (1957)	14
Pacific Maritime Ass'n v. NLRB, 452 F.2d 8 (9th Cir. 1971)	19
Porter Co. v. NLRB, 397 U.S. 99 (1970)	13
Railroad Co. v. Hanning, 82 U.S. (15 Wall.) 649 (1873)	14
Scales v. United States, 367 U.S. 203 (1961)	10
Singer Manufacturing Co. v. Rahn, 132 U.S. 518 (1889)	14
Smith v. California, 361 U.S. 147 (1959)	5-6
Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960)	12
Teamsters Local v. Lucas Flour Co., 369 U.S. 95 (1962)	13, 18
Textile Workers v. Lincoln Mills, 343 U.S. 448 (1952)	3
United Mine Workers v. Coronada Coal Co., 259 U.S. 344 (1922)	8
United States v. City of Buffalo, 357 F.Supp. 612 (W.D.N.Y. 1978)	16
Vaca v. Sipes, 386 U.S. 171 (1967)	18
Statutes	
Civil Rights Act of 1866, 42 U.S.C. § 1981	16-17
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.	16-17
National Labor Relation Act, as amended, 29 U.S.C. § 151 et seq.	11-14
29 U.S. § 411(a)(4)	11
29 U.S.C. § 481(g)	11
Miscellaneous	
W. Prosser, *Law of Torts* (4th ed. 1971)	14, 15, 16
Restatement (Second) of Agency	14, 15, 16

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO in this case is set forth in that motion.

The Court's order providing for review of the Mississippi Supreme Court's decision and judgment in this case states: "The petition for a writ of certiorari is granted. The case is set for oral argument in tandem with No. 81-280, *General Building Contractors Association, Inc. v. Pennsylvania* and related cases." — U.S. —, 50 L.W. 3375 (1981).

We understand the questions of imputed liability raised in these otherwise dissimilar cases to be the thread that ties them together.

Agency concepts have their genesis in the world of commerce. And rules of imputed liability such as *respondent superior* rest at bottom on the principal's legal right to set the manner in which his agents shall perform their assigned duties and the former's effective means of enforcing his will—the powers to retain, to discharge and to set compensation. It is for that reason that the critical distinction in this area has been that between agents who are "servants" and whose misconduct generates imputed liabilities and "non-servant agents," including "independent contractors," whose wrongdoing does not have that consequence.

There are substantial dangers in transporting a set of rules that grow out of, and are designed to fit, a certain set of relationships to other entirely distinct contexts. *Compare Kermerac v. Compaignie Generale*, 358 U.S. 625, 630-632 (1959). As we show in this brief, those difficulties are very much at the fore in determining the very meaning of such concepts as "principal," "agent" and "joint venturer" where the activity is not selling goods and services but a political boycott organized either by a single person or by a loose ad hoc association each of whose members is of equal rank, or where the parties are bound together not by traditional contractual arrangements or by the cash nexus but by the rules concerning "free collective bargaining" stated in the National Labor Relations Act, as amended. As this Court has recognized, sensitive and at times by no means obvious adjustments are called for in adapting and applying traditional common law concepts to take account of values, such as those stated in the First Amendment, or of unique jural relationships, such as those under the NLRA, that did not figure in the original calculus. *Compare New York Times v. Sullivan*, 376 U.S. 254

(1964); *Textile Workers v. Lincoln Mills*, 343 U.S. 448 (1952). And it appears true in this instance, as in others, that it is helpful in essaying the delicate task of shaping the proper federal rule to compare different but related situations such as the one in the instant case and that in *General Building Contractors et al.* In the argument that follows we therefore explore two paradigms that illuminate the imputed liability question where the wrong complained of grows out of expressive activity otherwise protected by the First Amendment. Then to sharpen the points made there we contrast the quite different governing principles and method of analysis called for where the claim is that an employer (or union) should be held liable for a wrong committed by the other party to collective bargaining.

ARGUMENT

I.

NAACP v. Claiborne Hardware raises issues of imputed liability in a context as sensitive as it is important: the context of group expressive activity. The case arises out of a "political boycott"—*viz.*, for purposes relevant here, an effort by blacks in Claiborne County, Mississippi, to obtain redress of numerous grievances (including desegration of schools, courtrooms, public hospitals, and other public buildings) that *inter alia* utilized attempts to persuade blacks in the County to refrain from patronizing respondents' businesses in order to exert pressure on respondents and through them on the County. The Mississippi Supreme Court did not purport to find—indeed it reversed the Chancery Court's findings to the effect—that the entire boycott effort was under Mississippi law unlawful. Rather, that court found only that eleven acts, occurring over more than a four-year period, were unlawful and did not identify the perpetrator of six of those acts. Yet these findings alone formed the predicate for affirming a sweeping injunction against all of the 91 petitioners and for imposing on each of them

liability for all monetary losses caused by the unlawful acts identified and by the lawful boycott acts as well.

The theory on which that liability rests is not at all clear to us from the opinion of the Mississippi court. For that reason—and because the case has broad implications and raises recurring issues of general significance—we think it useful to step back from the complex facts of this case and to examine, through two paradigms, the basic types of relationships which could, conceivably, from the basis for liability here or in like cases: the relationship of what we shall term "organizer" and "participant"; and the relationship of what we shall term "co-organizers."

1. *The "Organizer-Participant" Relationship.* A simple hypothetical illustrates this relationship, and poses the imputed liability issue: A—a membership group—plans, publicizes and sponsors constitutionally protected political activity such as a rally, a march, a speech, or a campaign of advocacy. A invites others—both its members and members of the public at large—to participate. Of the people who respond, one or more engages in acts of violence or commits other misdeeds in the course of the rally, etc. The victims of the wrong seek to hold A, the organizer of the event, liable for the acts of the participants. The question thus arises: to what extent may the organizer of an activity protected by the First Amendment be held responsible for the acts committed in the course of the activity by those who accept the invitation to join in the activity?

The answer to the question, we submit, lies in First Amendment principles which are well-established by the decisions of this Court. We begin with the elementary proposition that there is a "transcendent value to all society of constitutionally protected expression." *Bigelow v. Virginia*, 421 U.S. 809, 816 (1975). This is true not just of individual expression but of group expression

as well; indeed such collective expression is of especial importance because, as this Court recently observed, "by collective effort individuals can make their views known when, individually, their voices would be faint or lost." *Citizens Against Rent Control v. Berkeley*, —— U.S. ——, 50 L.W. 4071, 4072 (1981).

First Amendment freedoms are not only "supremely precious" in our society, however; they are also "delicate and vulnerable. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963). It is well established that the fear of damage awards may so deter the exercise of First Amendment rights. *E.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 277-278 (1964). This Court has thus "been especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974), *quoting NAACP v. Button*, *supra*, 371 U.S. at 433. And the Court's "decisions furnish examples of legal devices and doctrines, in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." *Smith v. California*, 361 U.S. 147, 150-51 (1959).

The doctrine of imputed liability, we submit, is such a doctrine. Applied in the economic sphere, there is little danger that imputing liability to A for the acts of his servant, agent, partner, or collaborator will deter A from engaging in a lawful, economic venture and even less danger that such imputed liability will deter A from engaging in constitutionally protected activity.[1] But, in

[1] *Cf. Smith v. California*, *supra*. In *Smith*, the Court, while acknowledging that States may impose strict liability on distributors of impure food without proof that the distributor knew of the impurity, held that States may not impose strict liability on

the context of expressive activity, rules imputing liability for the acts of participants can easily cast a grave chill over the exercise of First Amendment rights by would-be-organizers. Thus, in the First Amendment area, the rules of imputed liability a State fashions must be carefully measured against "exacting" constitutional standards. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

In determining the parameters of constitutionally permissible rules of imputed liability for sponsors of First Amendment activities, this Court's decision in the area of defamation provide a useful analogy. At common law, of course, defamation was a strict liability tort. This Court has recognized, however, "that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship." *Gertz v. Robert Welch, Inc., supra*, 418 U.S. at 340.[2] Yet, the Court also has acknowledged that there is a "legitimate state interest . . . [in] the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Id.* at 341.

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sellers of obscene material without proof of knowledge of the obscenity. The Court explained:

> There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of the speech and of the press stand in the way of imposing a similar requirement on the bookseller. [361 U.S. at 152-53]

[2] The Court had provided the doctrinal foundation for *Gertz* in *New York Times v. Sullivan, supra*, 376 U.S. at 279:

> Under such a rule [of strict liability], would-be-critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or for fear of the expense of having to do so. They tend to make only statements which 'steer far wide of the unlawful zone.' The rule then dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

The Court has thus sought "to define the proper accommodation between these competing concerns." *Id.* at 344. And the "accommodation" the Court has arrived at is, in essence, this: liability for defamation may be imposed only upon proof of "fault" by the defendant and only for compensation for "actual injury." *Id.* at 347, 349.[3]

The *New York Times-Gertz* analysis, we submit, provides the solution to the First Amendment question presented here. For in this instance, too, the question is whether a state court may apply familiar common law doctrine to impose monetary liability on an absolute fault standard so as to penalize and inhibit First Amendment rights. Like strict liability for defamation, so the automatic imputation of liability on the organizer of First Amendment activity for the misdeeds of participants would "lead to intolerable self-censorship." Yet, as in *Gertz*, the State does have an interest in "the compensation of individuals for the harm inflicted on them." Thus, here too, an accommodation of the competing interests is required.

In making that accommodation it is important to bear in mind first, that the State has no legitimate interest in providing compensation on account of activity protected by the First Amendment; and second, that the State can constitutionally achieve its aim of providing "compensation [to] individuals for the harm inflicted

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[3] The *degree* of fault constitutionally required to justify liability for defamation varies depending on the nature of the victim of the defamation. With respect to a "public person," the State has a "limited . . . interest" in providing compensation for a defamation; accordingly, the Court has required "clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth" in order to support liability for defamation. *Gertz, supra,* 418 U.S. at 342. For non-public persons, however, the Court has found the State interests in providing compensation far stronger and has permitted recovery on proof of negligence by the defendant in publishing the defamation.

on them" by imposing liability on the wrongdoers themselves.[4] In light of these considerations and the chilling effect that imputing liability to organizers of First Amendment activity for the conduct of each and every participant could have on group action, at the very least the "accommodation" struck in *Gertz* is equally compelled here: liability may not be imposed upon the organizer absent proof of fault on its part.

At a minimum, this means that liability could not constitutionally be imputed to an organizer of a First Amendment activity except on proof of "negligence" (as in *Gertz*) in managing that activity (as, for example by failing to comply with reasonable duties (not themselves unconstitutional) imposed by the State for maintaining order). Moreover, where, because of the political nature of the activities, the constitutional considerations are more closely analogous to those in *New York Times*, a higher degree of fault should be necessary for liability, that is, *knowing* commission of a wrong.[5]

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[4] In *New York Times* and *Gertz* the interest in providing compensation is not overcome unless the victim can establish that the harmful statement was made with the requisite degree of fault.

[5] An individual can be said to have knowingly committed a wrong not only when the individual personally executes the wrong, but also when the individual directs the wrongdoing or personally participates in the planning (or execution) of the wrong. A corporation or unincorporated association is likewise guilty of knowingly committing a wrong when it so acts. However, where the alleged wrongdoer is an entity, determining what constitutes its action often poses complex problems.

This Court addressed such problems in the context of labor organizations in *United Mine Workers v. Coronada Coal Co.*, 259 U.S. 344 (1922) and in *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925). In the first of these cases the Court, after concluding that an International Union was a suable entity, framed the issue of the Union's liability as follows: "whether the International Union was shown by any substantial evidence to have initiated, participated in, or ratified the interference with plaintiffs' business." 259 U.S. at 393. And in the second case the Court

2. *Co-Organizers.* Not infrequently, individuals and/or groups join together to plan, organize, and publicize a political event such as a march, rally, demonstration, etc. The event becomes, in a sense, their joint venture. If one of the co-organizers, in the course of the event, proceeds to commit an unlawful act, does the fact of the joint venture allow liability to be imputed to the other co-organizers more readily than liability can be imputed from a participant in the event to a single organizer?

The answer, we submit, is "No," as the analysis set forth in the context of the organizer-participant relationship applies equally. If liability could be imputed automatically to one co-organizer for another's wrongful acts a significant chill would be cast on the exercise of the right to associate to sponsor expressive activity. Furthermore, while the State does have an interest in providing compensation to the victim of the wrong, that interest is largely satisfied by providing a remedy against the actual wrongdoer/co-organizer, and does not require imputing liability to the others. For the reasons already given (*supra*, pp. 5-8), a constitutionally acceptable accommodation of the competing concerns requires that at least "fault" be proven on the part of the co-organizer to whom liability is to be imputed, and in cases like the present, a showing of knowing participation in the unlawful act is required.

The latter conclusion is buttressed by a series of closely analogous cases addressing the constitutionality of State efforts to impose criminal sanctions upon, or to deny benefits to, individuals on account of the wrongful acts of an organization with which the individual is or has been associated.

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emphasized that the Union could be said to have so acted only if it were "clearly shown . . . that what was done was done by [the union's] agents in accordance with [the union's] fundamental agreement of association." 268 U.S. at 304.

In those cases, the Court, concerned about "a real danger that legitimate political expression or association would be impaired," *Scales v. United States*, 367 U.S. 203, 229 (1961), "consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association" with an organization which had committed unprotected acts, *Healy v. James*, 408 U.S. 169, 186 (1974). Rejecting such a doctrine of strict liability, the Court formulated instead the following rule:

> [I]t has been established that 'guilt by association alone, without establishing that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny First Amendment Rights. The Government has the burden of establishing a *knowing* affiliation with an organization possessing unlawful aims and goals, *and a specific intent to further those illegal aims.* [*Id.* (emphasis added)]

"A mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis" to deny privileges to the member of the organization. *Keyishian v. Board of Regents*, 385 U.S. 589, 606 (1967). Likewise, unless one co-sponsor of a lawful, political event shares a "specific intent to further the unlawful aims" of his co-sponsor, there is "not a constitutionally adequate basis" to hold the one sponsor liable for misdeeds committed by the second sponsor in the course of the event.

* * * *

It does not appear that the Mississippi Supreme Court in its decision here observed the constitutional limits, just discussed, on imputing liability in the political action context. At the start of its opinion, the court placed great emphasis on the role of the NAACP in organizing and sponsoring the political boycott; these portions of the court's opinion suggest that the NAACP was being

held liable on the basis of misdeeds by participants in the boycott without more. At other portions of its opinion, the court emphasizes first, an agreement between the NAACP and the other petitioners to conduct the boycott campaign; and second, the fact that some of those who agreed to do so committed unlawful acts in the course of the campaign. These portions of the opinion suggest that the NAACP and the other petitioners were co-sponsors of the boycott and are being held liable for the acts of certain co-sponsors without more. But as we have seen, in either event, the First Amendment requires proof of "fault" on the part of the NAACP and of each of the other petitioners held liable. The Mississippi Supreme Court appears not to have found such fault.

II.

General Building Contractors Association, Inc. v. Pennsylvania and its companion cases raise issues of imputed liability in a rather different context, the context of employment discrimination. As in *NAACP v. Claiborne Hardware*, the rules for determining whether liability may be imputed must be determined by federal law—in this instance, federal statutory law. And as in *NAACP v. Claiborne Hardware*, the resolution of the issues depends upon a close analysis of the relationship of the parties—the employer and union—to determine whether that relationship warrants imputing the wrongs of one to the other. Since the employer-union relationship is largely a product of federal labor law, it is with that law that analysis must begin.

The national labor policy is premised on the right of employees to form autonomous labor organizations. "The theory of the [National Labor Relations] Act is that the making of voluntary labor agreements"—Congress' preferred means for achieving industrial peace—is "encouraged by protecting employees' rights to organize for collective bargaining." *Labor Board v. American Ins.*

Co., 343 U.S. 395, 401-02 (1952). Thus, § 7 of the NLRA grants employees the "right to *self*-organization." And § 8(a) of the Act prohibits employers from interfering with employees' exercise of that right on the one hand, or from contributing support to the formation of a labor organization on the other.[6] The Act thus contemplates workers free to form labor unions and unions free from the influence of employers. *See also* § 8(a)(2) of the NLRA.

Having thus guaranteed free and autonomous labor unions, the national labor policy requires employers and unions to bargain with each other "with respect to wages, hours and other terms and conditions of employment." (§§ 8(a)(5), 8(b)(3), 8(d)). At the outset of a collective bargaining relationship, the employer exercises complete control over such matters. "Management hires and fires, pays and promotes, supervises and plans. And these are part of its function and absent a collective bargaining agreement it may be exercised freely. . . ." *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 583 (1960). " 'The introduction of a concept of mandatory collective bargaining . . . necessarily represents an encroachment upon the former autonomous position of management.' " *NLRB v. Catholic Bishop*, 440 U.S. 490, 503 (1979). Through collective bargaining, unions seek to place limits on management's erstwhile complete control over the workplace, and may seek to obtain for themselves control over some of the functions that in the absence of a bargaining agreement would rest with management. "[T]he extent of union and management participation in the administration of such matters is itself a condition of employment to be settled by bar-

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[6] Similarly, 29 U.S.C. § 411(a)(4) prohibits an "interested employer or employer association" from finan[cing], encourag[ing] or participat[ing] in" any action against a union by a union member. And 29 U.S.C. § 481(g) prohibits an employer from expending monies to promote the candidacy of any candidate for union office.

gaining." *Labor Board v. American Ins. Co., supra,* 343 U.S. at 408.

The collective bargaining contemplated by labor policy thus "cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one." *Labor Board v. Insurance Agents,* 361 U.S. 477, 488 (1960). The law "referee[s] the process of collective bargaining" but "leav[es] results of the contest to the bargaining strength of the parties." *Porter Co. v. NLRB,* 397 U.S. 99, 108 (1970). "The parties . . . proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. . . . The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner Act and Taft-Hartley Acts have recognized." *Insurance Agents, supra,* 361 U.S. at 488-89. The system reflects Congress' intent that the parties "should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *Id.* at 488. *See also, e.g., California Brewers Ass'n v. Bryant,* 444 U.S. 598, 608 (1980); *Teamsters Local v. Lucas Flour Co.,* 369 U.S. 95, 104 (1962).

In sum, national labor policy contemplates autonomous unions and employers, negotiating with each other at arms length, over, *inter alia,* the respective role each is to play in the running of the workplace. National labor policy does not seek to predetermine the results of that bargaining but rather permits the parties to determine, based upon their respective bargaining power, the role each will play.

The implications of this relationship between union and employer for the issues of imputed liability in the employment discrimination context are as follows: [7]

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[7] *General Building Contractors et al.* involves not only unions and employers but also several contractor associations. These associations were formed by various employers to serve as the employers'

First, there is no possible principled basis for applying the doctrine of *respondeat superior* to impute discrimination by a union to the employer or *vica versa*. That doctrine, born of the relationship of master and servant, is predicated "upon the fact that the [wrong] is brought about in the course of an undertaking for the benefit, and subject to the right, of the principal to control his servant or other agent," *Restatement (Second) of Agency*, § 216, comment a; indeed, the doctrine is applicable only where the agent is "subject to the other's control or right of control," *id.* § 220(1); *see id.* § 250.[8] But, as we have seen, neither an employer nor a union necessarily acts "for the benefit of" the other, and neither is subject to the "control" of the other; to the contrary, the national labor policy requires that unions and employers be independent of each other and assumes that each acts in its own self-interest. Thus, the premise for *respondeat superior* is lacking in the union-employer relationship.

Second, the doctrine of joint enterprise liability is, in the main, equally inapplicable to the union-employer relationship. As Professor Prosser explains in his treatise:

> The doctrine of vicarious responsibility in connection with joint enterprises rests upon an analogy

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bargaining agent in multi-employer collective bargaining with the union. The right of the employers to designate such a bargaining representative of their choosing is expressly protected by § 8(b)(1)(B) of the NLRA. *See generally NLRB v. Truck Drivers Local 449*, 353 U.S. 87 (1957). The bargaining agent's sole function is to engage in bargaining on behalf of the employers. We know of no basis for imputing liability to such agents whose role in the collective bargaining system is so limited; indeed to do so is, in effect, to penalize the decision of employers to bargain through an association—a decision which the NLRA seeks to protect.

[8] See, e.g., *Singer Manufacturing Co. v. Rahn*, 132 U.S. 518, 523 (1889) ("the relation of master and servant exists wherever the employer retains the right to direct the manner in which the business shall be done as well as the result to be accomplished or, in other words, 'not only what shall be done, but how it shall be done.' *Railroad Co. v. Hanning*, 82 U.S. (15 Wall.) 649, 656."); W. Prosser, *Law of Torts*, § 70 (4th ed. 1971).

> to the law of partnership. In a partnership, there is a more or less permanent business arrangement, creating a mutual agency between the partners for the purpose of carrying on some general business, so that the acts of one are to be charged against another. A 'joint enterprise' is something like a partnership, for a more limited period of time, and a more limited purpose. It is an undertaking to carry out a small number of acts or objectives, which is entered into by associates under such circumstances that all have an equal voice in directing the conduct of the enterprise. The law then considers that each is the agent or servant of the others, and that the act of any one within the scope of the enterprise is to be charged vicariously against the rest. [W. Prosser, *Law of Torts*, § 72 (4th ed. 1971)]

With rare exceptions, unions and employers are not involved in "partnerships" in which each "ha[s] an equal voice," and in which "each is the agent or servant of the other." A collective bargaining agreement may leave complete authority over all management functions with the employer (subject to certain substantive limitations on the employer's power, as when an employer retains the power to discharge, but can do so only for cause). Or, an agreement may give complete authority over some functions to the union (as when the agreement provides for a union-run exclusive hiring hall). In either event, within their respective spheres, the union and the employer remain autonomous and independent. Thus, the doctrine of joint enterprise liability provides no basis for imputing liability from unions to employers or *vice versa*.

The only other basis that has been suggested or that we can conceive on which imputed liability in the employment discrimination context might rest is the doctrine of non-delegable duties. As stated in the *Restatement (Second) of Agency*, § 214, that doctrine provides:

> A master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides the performance of such duty to a servant or other person is subject to liability to such others for harm

caused to them by the failure of such agent to perform the duty.

The focus of that doctrine has been to impose liability on, *e.g.*, common carriers, landlords, municipalities, and employers for injuries suffered by *e.g.*, passengers, tenants, pedestrians, or workers as a result of negligence by a retained contractor in the maintenance of *e.g.*, trains, apartments, sidewalks, or workplaces. *See* W. Prosser, *supra*, § 71; *Restatement (Second) of Agency*, § 214, comments (b)-(d).

By its very nature, the non-delegable duty doctrine is inapplicable in several types of employment discrimination cases. Where a union is found to discriminate within a sphere indisputably its own—for example, where a union is found to discriminate in admitting members—the non-delegable duty doctrine is inapplicable since by no stretch of the imagination is the union performing a duty of the employer. Likewise, where an employer is found to discriminate in the exercise of a management prerogative over which the union has not obtained control—for example, where an employer which retains authority for hiring is found to discriminate in the hiring process—the non-delegable duty doctrine would be equally inapplicable, as the employer could hardly be said to be acting pursuant to a delegation by the union in hiring employees.[9] Thus, the only category of cases in which

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[9] A number of lower courts have nonetheless held unions vicariously liable for acts of discrimination by an employer on the theory that in enacting Title VII (and/or § 1981) Congress imposed on unions the duty to prevent employers from violating the law. *E.g. Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 989 (D.C. Cir. 1973); *Dickerson v. U.S. Steel Corp.*, 472 F.Supp. 1304, 1353-54 (E.D. Pa. 1978); *United States v. City of Buffalo*, 457 F.Supp. 612, 639 (W.D.N.Y. 1978). Under these cases, a union that fails to bargain for and enforce contract terms prohibiting employment discrimination—the very thing that Title VII and § 1981 proscribe—is liable for the employer's violations of those laws.

The duty that these cases place on unions is, so far as we are aware, without precedent. We know of no other situation in which a statute has been read to impose upon one private party a duty to

the non-delegable duty doctrine is even arguably applicable is cases in which a union, having secured respon-

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prevent another, independent private party from committing acts violative of the rights of third parties. That Congress did not intend, in Title VII or in § 1981, to create such a novel duty is apparent from the following considerations:

First, the language of Title VII and of § 1981 provide no support for the proposition that Congress intended to create the duty the courts have imposed on unions. In § 703(c) of Title VII Congress treated specifically with the subject of union responsibility for employer conduct and mandated that unions not *"cause or attempt to cause"* an employer to discriminate; Congress did not direct unions to prevent employers from discriminating. The fact that Congress provided for liability where a union causes an employer to discriminate "suggests that Congress did not intend [Title VII] liability to attach where such causation [is] absent." *Monell v. New York City Department of Social Services*, 436 U.S. 658, 691 (1978) (addressing analogous language in § 1983). And § 1981—which "affords no greater substantive protection than Title VII," *New York City Transit Authority v. Beazer*, 440 U.S. 571, 584 n.24 (1979), and which provides only that "All persons . . . shall have the same right to make and enforce contracts . . . as is enjoyed by white citizens"—cannot be read to impose on unions an affirmative duty to prevent employers from discriminating.

Second, there is not a word in the legislative history of Title VII or of § 1981 that even remotely suggests that Congress intended to impose upon unions the duty to police the conduct of employers. Had Congress desired to place such an extraordinary duty on unions, it surely would have given some hint of that intent.

Third, Title VII and § 1981 contain an enforcement mechanism which is in no way dependent upon action by unions. Under those laws, an individual whose rights are violated may sue the wrongdoer to obtain redress for the wrong that occurred. In addition, under Title VII there is a federally funded governmental agency, the Equal Employment Opportunity Commission, charged with enforcing the law. It is therefore especially unlikely that Congress decided, *sub silentio*, and without granting any monies to unions, to place on unions a duplicative and costly responsibility to insure that employers obey the commands of Title VII and § 1981.

Fourth, the duty to prevent employer discrimination which some courts have imposed upon unions is inconsistent with the national labor policy. Under that policy, unions are called upon to "balanc[e]

sibility over a function which, in the absence of a collective bargaining agreement would be exercised by management, proceeds to act discriminatorily in performing the function.

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individual and collective interests" so as to "maximize overall [welfare] of its members," *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 742 (1981); unions thus must establish their priorities (both in bargaining and in contract enforcement) based on an assessment of the overall interests of their members. Where Congress has seen a need to dictate certain substantive terms of employment (rather than relying on "economic combat," *Gateway Coal v. Mine Workers*, 414 U.S. 368, 379 (1974), to establish employee rights), it has done so directly, legislating the substantive result and providing a statutory mechanism for enforcing the rights thus created. This is precisely what Congress did in enacting Title VII. But Congress has never compromised the "process of free and voluntary collective bargaining," *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962), by attempting to shape the bargaining agenda of the parties. Nor did Congress do so in enacting Title VII:

> Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. . . . It does not behoove a court to second-guess either that process or its products. [*California Brewers Ass'n v. Bryant, supra*, 444 U.S. at 608]

One final point need be added. Nothing in the duty of fair representation, a duty which has been implied from the NLRA, imposes upon unions a responsibility to prevent employers from violating Title VII or § 1981. The duty of fair representation requires only that, in fulfilling its role as *exclusive bargaining representative*, a union's actions not be "arbitrary, discriminatory, or in bad faith," *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Moreover, the parameters of the duty of fair representation are of "equal scope" with the union's "authority . . . as exclusive bargaining agent." *Humphrey v. Moore*, 375 U.S. 335, 342 (1964). Since a union is not the exclusive agent for employees in the vindication of their statutory rights—Title VII rights exist independently of the union and can be enforced by an individual employee independently of the union, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)—unions have no such duty with respect to the enforcement of those statutory rights.

Even in this category of cases, we submit, the non-delegable duty doctrine has no place. To suggest that where the result of an economic contest such as collective bargaining is that one party must surrender authority over, e.g., hiring to the other the former has "delegated" or "confided" its function to the latter ignores central pieces of the national labor policy. In the first place, collective bargaining is not a process of delegation; it is, in large measure, combat between adversarial forces over the allocation of authority covering the employment process (*see* p. 13, *supra*). Furthermore, the authority to hire (or fire or promote) is not a duty which is vested by law in the employer unless "delegated" by him; the premise of the collective bargaining system is that the question of who will exercise that and similar authority is an open one, to be resolved in negotiation (*see* pp. 12-13, *supra*). Thus, the presuppositions of the non-delegable duty doctrine simply do not apply in the labor-management context, and the doctrine should not be imported into that context.[10]

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[10] In making this argument we recognize, of course, that in *Morrison-Knudsen Co. v. NLRB*, 275 F.2d 914 (2d Cir. 1960), *cert. denied*, 366 U.S. 909, and in several NLRB decisions predicated on *Morrison-Knudsen*, *e.g.*, *Fruin-Colnon Corp.*, 227 NLRB 59, 68 (1976), the non-delegable duty principle has been applied to impute liability to employers for union violations of § 8(b)(2) of the NLRA. *See also Pacific Maritime Ass'n v. NLRB*, 452 F.2d 8 (9th Cir. 1971). *But see Lummus Co. v. NLRB*, 339 F.2d 728 (D.C. Cir. 1964) and *NLRB v. Southern Stevedoring Co.*, 332 F.2d 1017 (5th Cir. 1964) (both requiring proof that the employer knew or should have known of the union's wrong—a requirement inconsistent with the non-delegable duty doctrine). For the reasons set forth in text, we respectfully suggest that these cases—which are devoid of any analysis— were erroneously decided and should not be extended into the employment discrimination context.

CONCLUSION

For the above stated reasons the judgment of the Supreme Court of Mississippi should be reversed.

Respectfully submitted,

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